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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 258

CENTRAL PACIFIC RAILWAY COMPANY, a corporation, and SOUTHERN PACIFIC COMPANY, a corporation, *Petitioners and Appellants below,*

vs.

COUNTY OF ALAMEDA, a body politic and corporate, CHAS. W. HEYER, RALPH RICHMOND, JOHN F. MULLINS, REDMOND C. STAATS and WILLIAM J. HAMILTON, Members of the BOARD OF SUPERVISORS OF SAID COUNTY, John Doe Corporation, Richard Roe Corporation, John Smith, Thomas Brown, James Coe, Joseph Hoe, Edward Poe, Robert Crow and Frederick Stow, *Respondents and Respondents below.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA AND BRIEF IN SUPPORT THEREOF.

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INDEX.

	Page
PETITION FOR WRIT OF CERTIORARI....	1
Summary Statement of Matter Involved.....	2
Reasons for Allowance of Writ.....	4
Prayer for Writ.....	4
BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.....	6
Opinion of the Court Below, 81 Cal. Dec. 652, ... Pac.	6
Jurisdiction	6
Statement of the Case	10
Specification of Errors	12
Summary of the Argument.....	13
Argument	13
1. The Effect of the Act of Congress Approved March 3, 1875 (18 Stat. 482) as Amendatory of Special Grants Theretofore Made by Congress Has Been Considered by this Court Favorably to Petitioners' Contention. It Was not Within the Intent or the Power of Congress to Impair Vested Title.	14
Authorities:	
Railway Company vs. Alling (Oct. Term 1878) 99 U. S. 463, 479	15
Sinking Fund Cases, 99 U. S. 700, 719, 757	14
Union Pacific R. R. Co. vs. Laramie Stock Yards, 231 U. S. 190, 200	18

Page

Union Pacific R. R. Co. vs. Snow, 231 U. S. 204 18
United States vs. Denver & Rio Grande Railway, 150 U. S. 1, 10 17
Act of June 8, 1872 (17 Stat. 399) 17
Act of March 3, 1875 (18 Stat. 482) 17

2. The State Police Power and the Power to Acquire Highway Rights by Adverse User Could not Extend Beyond the Railroad Company's Power of Alienation. Prior to May 25, 1920 (41 Stat. 621) the Railroad Company Had no Power to Alienate Longitudinal Strips of the Right of Way Acquired by Congressional Grant 19

Authorities:

Barnes vs. Southern Pac. Co., 16 Fed. (2nd.) 100, 104 25
Heilbron vs. St. Louis S. W. Ry. Co. of Texas, 52 Texas Civil Appeals, 575, 581 (113 S. W. 613) 26
Holland Co. vs. Nor. Pac. R. R. Co., 208 Fed. 598, 603 21
Holland Co. vs. Nor. Pac. R. R. Co., 214 Fed. 920, 926 4
Kindred vs. Union Pacific R. R. Co., 225 U. S. 582 20
Leavenworth etc. Ry. Co. vs. U. S., 92 U. S. 733, 748-749 21
Mulvihill vs. S. P. Co., 16 Fed. (2nd.) 100, 104 25

Page

Nadeau vs. Union Pacific R. R. Co., 253 U. S. 442 20
North Coast Ry. vs. Nor. Pac. Ry. Co., 48 Wash. 529, 94 Pac. 113 19
Nor. Pac. R. R. Co. vs. Smith, 171 U. S. 261 22
Nor. Pac. Ry. Co. vs. Townsend, 190 U. S. 267, 271 22
Olcott vs. Board of Supervisors, 16 Wall. 678 23
Railway Co. vs. Alling (Oct. Term 1878) 99 U. S. 463, 479 4
Sinking Fund Cases, 99 U. S. 700 14
Southern Pac. Co. vs. Hyatt, 132 Cal. 240, 242, 244 23
United States vs. Denver & Rio Grande Ry., 150 U. S. 1. 4
Williams, Mayor, et al. vs. Atlantic Coast Line R. Co., 17 Fed. (2nd.) 17, 21 24
Interstate Commerce Act, Sec. 1 (Subdv. 18) 23
Jones on Easements, Sec. 281, p. 232 ... 4

3. There Was No Federal Grant of County Highways Prior to the Right of Way Grant of July 1, 1862, Nor Until Four Years Thereafter. The County of Alameda Did Not Adopt the Traveled Way as a County Road. Any Claim of the County to the Traveled Way Was Renounced by the State in the Legislative Acts of May 1, 1852, and April 4, 1864. 26

Page

Authorities:

Railroad Co. vs. Baldwin, 103 U. S. 426 28
Town of Red Bluff vs. Walbridge, 15 Cal. App. 770 26
Tucson Consolidated Copper Co. vs. Reese (Ariz.), 100 Pac. 777, 778 28
Act of July 1, 1862 (12 Stat. 489) Sec. 12 8
California Statute of April 26, 1858, Sec. 1 28

Conclusion 29

TABLE OF CASES CITED.

Barnes vs. Southern Pacific Company, 16 Fed. (2nd.) 100, 104 25
Carlson vs. Curtis, 234 U. S. 103 10
Dana vs. Dana, 250 U. S. 220 10
Erie R. R. Co. vs. Hamilton, 248 U. S. 369 10
Gauthier vs. Morrison, 232 U. S. 452 10
Grayson vs. Harris, 267 U. S. 352 10
Green Bay etc., Canal Co. vs. Patten Paper Co., 172 U. S. 58 10
Heilbron vs. St. Louis S. W. Ry. Co. of Texas, 52 Texas Civil Appeals, 575, 581 (113 S. W. 613) 26
Holland Co. vs. Nor. Pac. R. R. Co., 208 Fed. 598, 603 21
Holland Co. vs. Nor. Pac. R. R. Co., 214 Fed. 920, 926 4
Jordan vs. Tashiro, 278 U. S. 123 10
Kindred vs. Union Pacific R. R. Co., 225 U. S. 582 20
Knights of Pythias vs. Meyer, 265 U. S. 30 10
Leavenworth etc. Ry. Co. vs. U. S., 92 U. S. 733, 748-749 21

Page

Missouri Valley Land Co. vs. Wiese, 208 U. S. 234 10
Missouri Valley Land Co. vs. Wrich, 208 U. S. 250 10
Mulvihill vs. S. P. Co., 16 Fed. (2nd.) 100, 104 25
Nadeau vs. Union Pacific R. R. Co., 253 U. S. 442 20
North Coast Railway vs. Northern Pacific Ry. Co., 48 Wash. 529, 94 Pac. 113 19
Northern Pacific R. Co. vs. Colburn, 164 U. S. 383 10
Nor. Pac. R. R. vs. Smith, 171 U. S. 261, 275 ....4, 22
Nor. Pac. Ry. vs. Townsend, 190 U. S. 267, 271..4, 22
Olcott vs. Board of Supervisors, 16 Wall. 678 23
Railroad Co. vs. Baldwin, 103 U. S. 426 28
Railway Co. vs. Alling, (Oct. Term 1878) 99 U. S. 463, 479 .....4, 15
Sinking Fund Cases, 99 U. S. 700, 719, 757....4, 14, 20
Southern Pacific Co. vs. Hyatt, 132 Cal. 240, 242, 244 23
Southern Pacific Co. vs. Schuyler, 227 U. S. 601, 611 10
Town of Red Bluff vs. Walbridge, 15 Cal. App. 770 26
Tucson Consolidated Copper Co. vs. Reese, (Ariz.) 100 Pac. 777, 778 28
Union Pacific R. R. Co. vs. Laramie Stock Yards, 231 U. S. 190, 200 18
Union Pacific R. R. Co. vs. Snow, 231 U. S. 204 18
United States vs. Denver & Rio Grande Railway, 150 U. S. 1, 10 .....4, 17, 20
Williams, Mayor, et al. vs. Atlantic Coast R. R. Co., 17 Fed. (2nd.) 17 .....4, 24

TABLE OF STATUTES AND COURT RULE.

	Page
Act of July 1, 1862 (12 Stat. 489) Sec. 12	2
Act June 8, 1872 (17 Stat. 399)	15
Act March 3, 1875 (18 Stat. 482)	3, 14
Act May 25, 1920 (41 Stat. 621)	6, 13
California Code Civil Procedure, Secs. 939, 940	3
California Constitution, Art. VI, Sec. 2	3
Cal. Stats. 1852, p. 150	10
Cal. Stat. April 26, 1858, Sec. 1	28
Cal. Stats. 1863-1864, p. 471	10
Cal. Supreme Court Rule XXX, Sec. 1	3
Interstate Commerce Act, Sec. 1 (Subdv. 18)	23
Judicial Code Sec. 237(b)	6
R. S. Sec. 2477	9
U. S. C. A. Title 28, Sec. 344(b)	6

TEXTBOOK.

Jones on Easements, Sec. 281, p. 232 ..... 4, 24

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vs.

COUNTY OF ALAMEDA, a body politic and corporate, CHAS. W. HEYER, RALPH RICHMOND, JOHN F. MULLINS, REDMOND C. STAATS and WILLIAM J. HAMILTON, Members of the BOARD OF SUPERVISORS OF SAID COUNTY, John Doe Corporation, Richard Roe Corporation, John Smith, Thomas Brown, James Coe, Joseph Hoe, Edward Poe, Robert Crow and Frederick Stow, *Respondents and Respondents below.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA AND BRIEF IN SUPPORT THEREOF.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show:

I.

SUMMARY STATEMENT OF MATTER INVOLVED.

That the Supreme Court of the State of California is the highest court of law and equity in said state; that the judgment of said court hereinafter mentioned is a final judgment, and presents a federal question reviewable by this court on certiorari, as hereinafter particularly pointed out.

This was a statutory proceeding to quiet title, brought by petitioners in the Superior Court of the State of California in and for the respondent county of Alameda. The case involved respondents' assertion of right to maintain certain county roads encroaching longitudinally upon the railroad right of way 400 feet in width granted to petitioners' predecessor, Central Pacific Railroad Company of California, by Act of Congress approved July 1, 1862. (12 Stat. 489.)

The county highway encroachments were described in the complaint in six several parcels, and the trial court adjudged the fee title vested in petitioner Central Pacific Railway Company as to all. (R. p. 54.) As to three parcels of highway the trial court awarded exclusive possession to petitioners, Central Pacific Railway Company as owner and Southern Pacific Company as lessee and operator of the railroad. (R. p. 61.)

The remaining three parcels of highway are portions of a public county road extending through a three-mile pass in the hills of Alameda County, known as Niles Canyon. (See Defendants' Exhibit D, being a portion of topographic sheet of the Pleasanton

Quadrangle United States Geological Survey, R. opp. p. 132.) As to these three parcels the trial court found Central Pacific Railway Company's title qualified by section 2 of the Act of Congress approved March 3, 1875 (18 Stat. 482) being the general act granting railroad rights of way through the public domain. (R. pp. 61-62.)

Petitioners appealed as of right (California Code of Civil Procedure, sections 939, 940) to the State Supreme Court from that part of the judgment holding the right-of-way title qualified by the Act of March 3, 1875. The Supreme Court of California on April 27, 1931, affirmed the judgment below. (R. p. 199.) Petition for rehearing was filed by the petitioners here, and denied. (R. p. 200.) The judgment of the Supreme Court became final May 27, 1931. (Constitution of California, Article VI, Section 2; California Supreme Court Rule XXX, Section 1.)

In affirming the judgment the Supreme Court of the State held (1) that this railroad right of way granted by special act of Congress is amenable to the police power of the state for longitudinal highway encroachments (R. p. 193 *et seq.*); (2) that the respondent County of Alameda had acquired a right of way easement by adverse user (R. p. 199 *et seq.*); (3) that the special right of way grant of July 1, 1862, was amended by the Act of March 3, 1875, authorizing joint occupancy of the right of way by the railroad and by the highway. (R. p. 199.)

II.

REASONS FOR ALLOWANCE OF WRIT.

(1). The ruling of the State Supreme Court that the police power extends to the taking of longitudinal strips of railroad right of way specially granted by Congress is inconsistent with numerous rulings of the Supreme Court of the United States, notably *Nor. Pac. R. R. v. Smith,* 171 U. S. 261, 275; *Northern Pacific Ry. vs. Townsend,* 190 U. S. 267.

(2). The ruling that longitudinal portions of the railroad right of way may be acquired by adverse user is contrary to the decisions of this court above mentioned and contrary to the general rule (Federal and State) that the continuous operation of a railroad on the right of way forestalls adverse rights in the general public. *Williams, Mayor, et al., vs. Atlantic Coast R. R. Co.,* 17 Fed. (2nd) 17; *H. A. & L. D. Holland Co. vs. Nor. Pac. Ry. Co.,* 214 Fed. 920, 926; *Jones on Easements,* Sec. 281, p. 232.

(3). The ruling of the state court that the right of way grant of July 1st, 1862, was, as to vested title, qualified and diminished by the Act of March 3, 1875, is inconsistent with the ruling of this court in the *Sinking Fund Cases,* 99 U. S. 700, 719, 757; *Railway Co. vs. Alling,* 99 U. S. 463, 479; *United States vs. Denver & Rio Grande Ry.,* 150 U. S. 1, 10.

Wherefore, your petitioners pray that a writ of certiorari issue under the seal of this court, directed to the Supreme Court of the State of California, commanding said state court to certify and send to

this court a full and complete transcript of the record and of the proceedings of the said State Supreme Court had in the case designated and entitled on its docket S. F. No. 13041, Central Pacific Railway Company *et al.*, Plaintiffs and Appellants, vs. County of Alameda, *et al.*, Defendants and Respondents, to the end that this cause may be reviewed and determined by this court, as provided by the statutes of the United States; and that the judgment therein of said State Supreme Court be reversed by this court, and for such further relief as to this court may seem proper.

Dated: July 10, 1931.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF THE COURT BELOW.

The opinion in the Supreme Court of the State of California (R. p. 187 *et seq.*) is reported in 81 Cal. Dec. page 652; 299 Pac. Rep. 75

II.

JURISDICTION.

(1). The date of the decision to be reviewed is April 27, 1931 (R. p. 187) which became final under the state constitution (Art. VI, Sec. 2) and the rule of the Supreme Court (Rule XXX, Sec. 1) on May 25, 1931. (R. p. 200.)

(2). The statutory provision which is believed to sustain the jurisdiction of this court is Judicial Code Section 237(b); U. S. C. A. Title 28, Section 344(b). This is a case where a railroad right of way title is specially claimed by petitioners under a federal statute (12 Stat. 489), and the court below has held that claim invalid in part by reason of the following: (a) an assumed retroactive amendment by a later federal statute (18 Stat. 482) a question not heretofore in specific terms decided by this court, though applicable decisions indicate a rule to the contrary; (b) exercise of police power infringing federal interest and against the rule of federal decision; (c) adverse user to the same effect.

(3). The facts showing that the nature of the case and the ruling below were such as to bring the case within the jurisdictional provisions relied upon are briefly these:

(*a*). The railroad right of way is claimed by petitioners directly under Congressional grant of July 1, 1862. (12 Stat. 489.) The State Supreme Court, affirming the judgment of the trial court, held (R. p. 189):

> "In 1862 Congress enacted the so-called Pacific Land Grant Act, whereby the Central Pacific Railroad Company was granted a right of way 400 feet wide over and across government lands in California to the Pacific coast, for the purpose of constructing along the center thereof a railroad and telegraph line to serve as a link in the first transcontinental railroad. Part of the route selected by said company was through the Niles canyon, which was then unappropriated public land."

And the Supreme Court has concluded with the trial court (R. p. 190):

> "The trial court's conclusions of law were that the Central Pacific Railway Company is the owner of the paramount title in fee to the land now occupied by said highway and lying within the boundaries of said 400-foot right of way, 'subject to an easement in favor of defendant County of Alameda by reason of necessity to maintain its present right of way for highway purposes * * * subject, however, to the terms and conditions of that part of section 2 of the Act of Congress approved March 3, 1875, entitled

> "An act granting to railroads the right of way through the public lands of the United States" (18 Stat. 482), declaring "and the location of such right of way through any canyon, pass or defile shall not cause the disuse of any wagon or other public highway located therein, nor prevent the location through the same of any such wagon road or highway where such road or highway may be necessary for the public accommodation; and where any change in the location of such wagon road is necessary to permit the passage of such railroad through any canyon, pass or defile, said railroad company shall, before entering upon the ground occupied by such wagon road, cause the same to be reconstructed at its own expense in the most favorable location and in as perfect a manner as the original road.'"

(*b*). In addition to the foregoing assumed retroactive amendment of the Act of July 1st, 1862, by the Act of March 3, 1875, the State Supreme Court has found the grant of July 1st, 1862, further qualified by general law subjecting longitudinal portions of such rights of way to be taken for highway purposes by condemnation under the state police power. The opinion in this regard recites (R. p. 193):

> "Moreover, it has been consistently held that in cases of public necessity such rights of way are at all times amenable to the police power of the state and subject to the state's right of eminent domain, provided that in the exercise thereof the special purpose of the grant to the railroad is not thereby impaired."

Upon this same point the state court says further, citing certain other state cases (R. p. 195):

> "It is, therefore, held here that the petitioner may invoke the power of eminent domain to acquire a longitudinal part of claimant's right of way if the showing as to the necessities of the two companies in the interest of the public service is sufficient to warrant it."

(*c*). The State Supreme Court has found a third limitation upon the right of way title, that the 400 foot width may be diminished by adverse user. Upon this point the opinion recites (R. p. 199):

> "But even assuming that the act of 1875 does not so apply, the county is nevertheless clearly entitled to a decree under the doctrine of adverse user, establishing its easement in those portions of the right of way now occupied by its highway, leaving for further determination the question of the superior need of those portions of the right of way, in case appellants should claim that the same were essential to the convenient operation of its railroad."

(*d*). Respondents' claim also rests upon a federal question. The Supreme Court holds (R. p. 188):

> "For approximately seventy years the county of Alameda has maintained a public highway through and along the bottom of the Niles canyon from Niles to Sunol. It was laid out and declared to be such by the county in 1859, and has since served as one of the main arteries of travel between the bay regions of southern Alameda county and the Livermore valley."

This statement is challenged by petitioners upon the federal issue that until July 26, 1866 (R. S. Sec. 2477) there was no authority from Congress by which the county could acquire a right of way over the public

domain. The railroad right of way title was then perfect.

(*e*). A further and incidental question is presented in that the legislature of the state of California on May 1, 1852, memorialized Congress for this transcontinental railroad as a measure of self-protection, and granted to the federal government a right of way therefor. (Cal. Stats. 1852, p. 150.) On April 4, 1864, the state legislature ratified the congressional railroad right of way grant of July 1st, 1862. (Cal. Stats. 1863-1864 p. 471.) These legislative enactments rise above any claim by the county and feed petitioners' claim under the federal statute. The recital last quoted is further challenged by petitioners upon the evidence, the findings of the trial court, and local law.

(*4*). The cases believed to sustain the jurisdiction of this court to review said cause on certiorari are as follows: *Jordan vs. Tashiro,* 278 U. S. 123; *Grayson vs. Harris,* 267 U. S. 352; *Knights of Pythias vs. Meyer,* 265 U. S. 30; *Dana vs. Dana,* 250 U. S. 220; *Erie R. R. Co. vs. Hamilton,* 248 U. S. 369; *Carlson vs. Curtis,* 234 U. S. 103; *Gauthier vs. Morrison,* 232 U. S. 452; *Southern Pacific Co. vs. Schuyler,* 227 U. S. 601, 611; *Missouri Valley Land Co. vs. Wiese,* 208 U. S. 234; *Same vs. Wrich,* Id. 250; *Green Bay etc. Canal Co. vs. Patten Paper Co.,* 172 U. S. 58; *Northern Pacific R. Co. vs. Colburn,* 164 U. S. 383.

III.

STATEMENT OF THE CASE.

The facts underlying the primary issues are stated in the petition and in the foregoing portions of this

brief. The history of the highway might be stated more fully. We have quoted the opinion that this highway was laid out and declared to be a county road in 1859. Further along in the opinion it is said (R. p. 191) "and part of the evidence supporting the finding shows that pursuant to a petition presented to the board in November, 1858, survey No. 247 was made by the board and filed in May, 1859; and that after due notice and hearing the board declared the road as surveyed and located to be a public highway and directed that it be opened forthwith."

The local law provided (Cal. Stats. April 26, 1858) that no road shall be considered a public highway unless declared such by order of the court of sessions or the board of supervisors. The line adopted by the board of supervisors in 1859 was surveyed and platted by the county surveyor of Alameda County, the plat dated April 11, 1859, being inserted in the record as Defendants' Exhibit B (R. opp. p. 98). It will be observed the adopted highway line throughout its entire distance is north of Alameda creek. But that line was never opened. Most of the travel was in the bed of the creek. (R. p. 113.) Crossings were several. (R. p. 120.) Defendants' Exhibit D (R. opp. p. 132) being a portion of topographic sheet of the Pleasanton Quadrangle, United States Geologic Survey, shows four crossings in a distance of about a mile in the canyon. The trial court found "that it cannot be ascertained from the evidence whether the survey for road No. 247 is identical in any particular with county road No. 4974, adopted by the Board of Supervisors of the defendant County of Alameda March 27, 1911, or whether the highway actually

traveled prior to 1911 followed the line of survey No. 247 for any distance whatever." (R. p. 50.) The Supreme Court says upon this point: "In 1910 or thereabouts, on account of the flood waters of the creek, the county was obliged to reconstruct much of its highway, and in doing so it moved a considerable stretch, lying about midway between Stony Brook and Sunol, within the railroad right of way and on the north side of the creek, to the south side of the creek and outside of the right of way." (R. p. 189.)

IV.

SPECIFICATION OF ERRORS.

1. The court erred in holding that the Act of July 1, 1862, was retroactively amended and qualified by the Act of March 3rd, 1875, as to petitioners' vested title.

2. The court erred in holding that the police power of the state extends to the appropriation of longitudinal strips of land within the boundaries of the right of way 400 feet in width granted by the Act of July 1, 1862.

3. The court erred in holding that respondents had acquired the right by adverse user to maintain a county road paralleling and within the boundaries of the railroad right of way granted by the Act of July 1, 1862.

4. The court erred in holding that the respondent County of Alameda could acquire any highway right prior to the highway grant of July 26, 1866 (R. S.

Sec. 2477); or that it could acquire any license which was not defeated by the Act of Congress approved July 1, 1862.

5. The court erred in holding that the way traveled through Niles Canyon at or prior to the time of the railroad right of way grant was ever adopted by the board of supervisors of Alameda County as a public highway.

V.

SUMMARY OF THE ARGUMENT.

1. *The effect of the Act of Congress Approved March 3, 1875 (18 Stat. 482) as Amendatory of Special Grants theretofore Made by Congress Has Been Considered by this Court Favorably to Petitioners' Contention. It was not within the Intent or the Power of Congress to Impair Vested Title.*

2. *The State Police Power and the Power to Acquire Highway Rights by Adverse User Could not Extend beyond the Railroad Company's Power of Alienation. Prior to May 25, 1920 (41 Stat. 621) the Railroad Company Had No Power to Alienate Longitudinal Strips of the Right of Way Acquired by Congressional Grant.*

3. *There Was No Federal Grant of County Highways Prior to the Right of Way Grant of July 1, 1862, nor until Four Years thereafter. The County of Alameda Did not Adopt the Traveled Way as a County Road. Any Claim of the County to the Traveled Way Was Renounced by the State in the Legislative Acts of May 1, 1852, and April 4, 1864.*

VI.

ARGUMENT.

1.

The Effect of the Act of Congress Approved March 3, 1875 (18 Stat. 482), as Amendatory of Special Grants Theretofore Made by Congress Has Been Considered by this Court Favorably to Petitioners' Contention. It was Not Within the Intent or the Power of Congress to Impair Vested Title.

We have said under this point that this court has not heretofore in specific terms decided the question whether the Act of March 3rd, 1875, constituted a retroactive amendment of previous special grants in cases where the title was vested prior to March 3rd, 1875. There are cases from this court, however, which seem to compel a ruling that the Act of March 3rd, 1875, cannot be construed as an amendment of the Act of July 1, 1862, so as to diminish the right of way here in question. Certainly there is nothing in the act of 1875 purporting to modify or prejudice any prior grant; nor is it conceivable that congress could have qualified the grant of July 1st, 1862, as to vested right of way had congress so desired. The *Sinking Fund Cases*, 99 U. S. 700, 719, 757, are among the first to decide this principle. We find in the language of Mr. Chief Justice Waite, at page 719 of that opinion a very persuasive statement in line with our contention:

> "The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as

it would be if the repudiator had been a state or a municipality or a citizen. No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable."

There were dissenting views on certain points, but apparently there was no dissent upon the integrity of the vested title. The foregoing quotation occurs in the main opinion, and the bench seems to have been entirely agreed upon the proposition that the grant vested title indefeasible except upon breach of the implied condition that the grant would be exercised for the purpose intended. Mr. Justice Field says upon the same point at page 757, that so far as the title is concerned, the contract between the government and the railroad company was an executed and closed transaction, and that the title was as much beyond the reach of the government as any other property vested in private proprietorship.

Cases are limited where the specific issue of title was presented; we have found none where the question involved right of way vested prior to March 3rd, 1875. There is a case where the special right of way grant preceded the Act of March 3rd, 1875, but the title was not claimed, and the grant was subject to forfeiture, on March 3rd, 1875. *Railway Company vs. Alling* (Oct. Term 1878) 99 U. S. 463, 479. That case had to do with the following facts:

Congress on June 8, 1872 (17 Stat. 399) granted to Denver and Rio Grande Railway Company a right of way, conditioned that the grantee should complete its road to a point on the Rio Grande as far south as Santa Fe within five years, and complete each

year thereafter fifty miles additional south of that point. The road was not completed to Santa Fe within the allotted period, and on March 3, 1877, Congress amended the grant of June 8, 1872, extending the period to ten years from the original act to complete the road as far south as Santa Fe. In the meantime, and after the approval of the Act of March 3, 1875, Cañon City and San Juan Railway Company asserted its claim under the latter act to occupy the Grand Cañon of the Arkansas. Mr. Justice Harlan, expressing the opinion of the court, said at page 479:

> "Our next inquiry is as to the extent to which the rights of the Denver Company were affected or modified by the act of March 3, 1875. When that act was passed, its grant of the right of way by the act of June 8, 1872, had not been acted upon as to the Grand Cañon of the Arkansas. There had not been, on March 3, 1875, an actual location of its line through that defile, nor any occupancy thereof, in good faith, for the purpose of constructing its road. The five years originally given to that company, within which to complete its railway to a point on the Rio Grande as far south as Santa Fe, expired on the 8th of June, 1877. Before, however, the expiration of that period, the time was extended to ten years from the passage of the original act. Now, it is solely by reason of such extension that the Denver Company had the right, on the 19th of April, 1878, to take possession of the Grand Cañon, and prepare for the final location and construction of its road through that pass. When, therefore, it accepted the benefits of the Act of March 3, 1877, it must be held to have assented to the provisions of the Act of March

> 3, 1875, whereby it was declared in the interest of the public, that any other railroad company duly organized under the laws of any State or Territory might use and occupy the cañon, for the purpose of its road, in common with the road first located."

The reasoning of the court necessarily accepts the hypothesis that the Denver Company by reason of its default had no rights whatsoever in the Grand Cañon of the Arkansas on March 3, 1875. Congress could and did waive the forfeiture and imposed upon the grant the further restrictions of the Act of March 3, 1875.

Our construction of this decision is reinforced by the opinion in *United States vs. Denver & Rio Grande Railway*, 150 U. S. 1, 10. In that case the government challenged the right of Denver & Rio Grande Railway Company to avail itself of the incidental benefits of the Act of March 3, 1875, because the company having accepted the special grant of June 8, 1872, subsisting at the time of the passage of the Act of March 3, 1875, could not rightfully claim the benefits of the latter act. The court said, at page 10:

> "In that case the Denver Company (the defendant in error here) had in 1871 and 1872 merely made a preliminary survey of its line through the Grand Cañon of the Arkansas, but had postponed the actual location and final appropriation of its roadway through that defile until April, 1878, at which date it was subject to the provisions of the Act of 1875 (the second section of which conferred upon other roads the right, upon certain terms and conditions, to use its track or roadway through such defiles), for

> the reason that after the passage of that act the Denver Company had accepted the benefit of the Act of March 3, 1877, extending the time for the completion of its road to Santa Fe, which extension the court assumed would hardly have been given by Congress except subject to the conditions contained in the Act of 1875. Being subject to the provisions of the law, as contained in the second section of the act of 1875, while in the exercise of its rights under the act of 1872, as amended by the act of 1877, in no way prevented the railway company from complying with its conditions and securing the benefits conferred by the first section of the act of 1875."

Otherwise expressed, the right of way grant to the Denver Company was in a sense executory on March 3, 1875, by reason of condition broken. The grantee was bound to accept its new privileges subject to existing law. But such is not the case before this court. Here there was no breach of condition, no failure to perform on the part of the railway company. The road was constructed long prior to the Act of March 3rd, 1875.

The opinion below purports to find support for retrospective amendatory operation of the Act of March 3rd, 1875, in the wholly irrelevant act of congress approved June 24, 1912, ratifying certain right of way deeds executed by the Union Pacific Railroad Company. The opinion cites *Union Pacific R. R. Co. vs. Laramie Stock Yards,* 231 U. S. 190, 200, and *Union Pacific R. R. Co. vs. Snow,* Id. 204, and the opinion erroneously declares the effect of these decisions as follows:

"On the contrary it appears therefrom that in 1912 Congress did enact legislation which had the direct effect of depriving the Union Pacific R. R. Co. of certain unused portions of the rights of way previously granted to it under this very act of 1862, and the right of Congress so to do was not challenged." (R. p. 197.)

Contrary to the opinion of the state court, the Supreme Court of the United States distinctly held that to give the Act of June 24, 1912, a retroactive effect "may incur the opposition of the Constitution." (231 U. S. 200.)

The Act of June 24, 1912, is not only irrelevant to the grant to Central Pacific Railroad Company of California but irrelevant also to the purpose and effect of section 2 of the Act of March 3rd, 1875.

2.

The State Police Power and the Power to Acquire Highway Rights by Adverse User Could Not Extend Beyond the Railroad Company's Power of Alienation. Prior to May 25, 1920 (41 Stat. 621), the Railroad Company Had No Power to Alienate Longitudinal Strips of the Right of Way Acquired by Congressional Grant.

This point of contention bears upon the second and third specifications of error. The state court rests its opinion on the issue of police power in part upon several federal decisions involving right of way *crossings.* (R. p. 194.) For the authority to take by eminent domain extended *longitudinal* strips the opinion rests wholly upon a state case, *North Coast Railway vs. Northern Pacific Railway Company,* 48

Wash. 529, 94 Pac. 113 (R. p. 194) but the North Coast-Northern Pacific case does not purport to establish a rule governing right of way titles fully vested under special federal grant prior to the Act of March 3rd, 1875. The ruling is not out of harmony with what we have quoted from the *Sinking Fund Cases* and from *Railway vs. Alling* and *United States vs. Denver & Rio Grande Railway*. The Northern Pacific Railroad Company claimed under the special right of way grant of July 2nd, 1864, but the right of way involved in that case was in a narrow defile, known as "Union Gap," owned by certain Indians, and was expressly regarded by the Supreme Court of Washington as not subject to the right of way grant until ceded by the Indians in 1885. The Supreme Court of Washington has to say upon this point (94 Pac. 113):

> "That portion of the right of way here in question lies within said reservation, and was not a part of the public lands within the meaning of the said act of Congress, which the United States could then absolutely grant. The reservation thereof to the Indians, therefore, remained in force until the year 1885."

This decision was long before the rule established by this court in *Nadeau vs. Union Pacific R. R. Co.*, 253 U. S. 442 and *Kindred vs. Union Pacific R. R. Co.*, 225 U. S. 582, to the effect that the right of way granted by the Act of 1862 was effective in Indian reservations. Whether the reasoning of the Supreme Court of Washington was sound or not under the circumstances of that case, it is clear that the court rested its decision upon the assumption that the

right of way did not take effect in Union Gap until the year 1885. If the special grant of July 2nd, 1864, did not take effect *in praesenti*, it did not take effect at all (*Leavenworth etc. Ry. Co. vs. U. S.*, 92 U. S. 733, 748-749), and the Northern Pacific Railway Company had to look to subsequent federal authority for its right of way through Union Gap. The court may well have assumed, as did this court in the Alling case, *supra*, that any federal authority granted subsequent to the Act of March 3rd, 1875, was conferred in view of that grant and subject to its limitations.

The late Judge Rudkin of the Ninth Federal Circuit was a member of the Supreme Bench of Washington when the North Coast-Northern Pacific case was decided. It was he who rendered the decision in the eastern district of Washington in the case of *Holland Co. vs. Nor. Pac. R. R. Co.*, 208 Fed. 598, 603. That case denies the power of the railway company to alienate a longitudinal strip of its congressional right of way for highway purposes. The opinion declares, page 603, that the power of the railroad company to dispose of any part of its right of way of its own volition is measured by what it may be compelled to do under the police power of the state. Conversely, the police power of the state cannot extend beyond the power of the railroad company to give its voluntary consent, because both propositions are limited in the same degree by the same federal restriction. Nowhere in the federal statutes prior to May 25, 1920 (41 Stat. 621) can be found any authority for the alienation for highway purposes of any portion of a railroad right of way granted by special act of Congress.

On appeal of the Holland case to the Circuit Court of Appeals for the Ninth Circuit (214 Fed. 920) the appellate tribunal considered the authorities upholding ways laid out *across* the right of way, and held at page 926:

> "But in no substantial sense do these considerations apply to the case of a street or other highway laid out along, instead of across, the right of way. Granting the need of a road running parallel or in the same general direction with the railroad, there is no necessity for imposing the burden thereof upon the right of way. It is hardly probable that the practice of so locating a highway was common at the time the act was passed, and, upon the whole, it is unreasonable to suppose that Congress anticipated that such a use would ever be made of the right of way. It imposes a much greater burden than a mere crossing, for it is practically exclusive of both possession and use by the railroad company, while a crossing only qualifies or temporarily interrupts such possession and use."

Limitation upon the company's power of alienation is clearly set forth in *Northern Pacific Railroad vs. Smith*, 171 U. S. 261, quoted in *Northern Pacific Ry. Co. vs. Townsend*, 190 U. S. 267, 271:

> "Nor can it be rightfully contended that the portion of the right of way appropriated was not necessary for the execution of the powers conferred by Congress, for, as said in *Northern Pacific Railroad Co. v. Smith*, 171 U. S. 261, 275; (18 S. Ct. 794, 799; 43 L. Ed. 157) speaking of the very grant under consideration: 'By granting a right of way four hundred feet in width, Congress must be understood to have conclusively determined that a strip of that width was

necessary for a public work of such importance.' Neither courts nor juries, therefore, nor the general public, may be permitted to conjecture that a portion of such right of way is no longer needed for the use of the railroad and title to it has vested in whomsoever chooses to occupy the same. The whole of the granted right of way must be presumed to be necessary for the purposes of the railroad, as against a claim by an individual of an exclusive right of possession for private purposes."

This judicial declaration does not necessarily conclude the inquiry as to concessions which might be made for public purposes. On the other hand it does not even suggest power of alienation or liability to loss by adverse user for public purposes not in furtherance of railroad operation. Under the *Interstate Commerce Act*, section 1, (Subdv. 18), a common carrier may not alienate or abandon any part of its property for any purpose without first having obtained from the Interstate Commerce Commission a certificate that the present or future public convenience and necessity will not be prejudiced.

The Supreme Court of California has long recognized the principle clearly expressed by the Supreme Court of the United States that a railroad right of way is itself a public highway of a special and restricted nature In *Southern Pacific Company vs. Hyatt*, 132 Cal. 240, 242, 244, the state court quotes from *Olcott vs. Board of Supervisors*, 16 Wall. 678, saying:

"That railroads, though constructed by private corporations and owned by them, are public highways, has been the doctrine of nearly all the courts ever since such conveniences for passage and transportation have had any existence."

> * * * "It is said that railroads are not public highway *per se*; that they are only declared such by the decisions of the courts; and that they have been declared public only with respect to the power of eminent domain. This is a mistake. In their very nature they are public highways. It needed no decision of courts to make them such."

The same case quotes with approval (page 244) the general rule declared in Jones on Easements:

> "Jones on Easements lays down the rule that the prescriptive right to a passageway along the track or right of way of a railroad cannot be acquired by the public, or by individuals, while the railroad is constantly using a single track over such right of way. The construction and operation of one track on its location is an assertion of right to the entire width of its right of way. The presence of one track constantly in use is a definite badge of ownership and the only practical assertion of title that can be made. If the public has used paths by the side of the railroad track for any length of time, the use must be considered as permissive, and not adverse. (Citing a long list of authorities from different states; Jones on Easements, sec. 281, p. 232.)"

The federal view point is given in *Williams, Mayor, et al. vs. Atlantic Coast Line R. Co.*, 17 Fed. (2nd.) 17, 21, that the law does not require a railroad in order to preserve its right of way, to act the dog in manger and churlishly refuse to allow the public to use a portion of its right of way for a street or road where such portion is not then needed. The court in that case enjoined the town of Mullins, South Carolina, from laying hard surface paving on portions of a street within the railroad right of way, notwith-

standing the fact that there was in that case no legal restriction on the company to convey or dedicate, and the city had used the street for half a century. (Page 21.) The court approved the rule, page 20, that no right could be acquired by the town by prescription, and on page 21, that there was no element either of estoppel or abandonment presented by the circumstances.

The views of the Circuit Court of Appeals for the Ninth Circuit in the Holland case, *supra,* are again approved in *Barnes vs. Southern Pacific Company,* 16 Fed. (2nd.) 100, 104, and *Mulvihill vs. Southern Pacific Company,* 16 Fed. (2nd.) 100, 104:

> "Congress has not authorized the disposition of unused portions of the right of way. The power of the railroad company to alienate, as well as the power of others to acquire, any part thereof, is measured, not by what can be spared from railroad uses, but by what is required to meet such needs of the public or of individuals as fall within the scope of the principle already discussed. Privileges conferred by revocable licenses are, of course, excluded. In such cases the railroad company never loses its right to possession and control."

We quote also from the Court of Civil Appeals of the State of Texas:

> "To hold that the mere use by the public, without objection, of a portion of a railway right of way, and continued during the statutory period of limitation, or for twenty years, would cause the railway company to lose the use of its property which it may need for legitimate purposes connected with its operation, would cause unutter-

able confusion and bring about in this state a condition of affairs which would seriously interfere with railway traffic. A railroad is itself a public highway, constructed and operated for the public benefit, and some courts have gone so far as to hold that a right by prescription, or limitation, cannot be acquired against a railroad to any portion of its right of way. Southern P. Ry. Co. v. Hyatt, 54 L. R. A., 522; Northern P. Ry. Co. v. Smith, 171 U. S., 260; Jones on Easements, sec. 281, and authorities cited in note. There are many portions of railway tracks and rights of way, especially around and near depots in cities and large towns, where the public use the right of way for passing to and fro continuously, and where such use has been kept up in some cases far beyond the period of time necessary to create an absolute easement—yet no court in this state has ever treated such persons, when injured while using the railway right of way, as more than licensees."

Heilbron vs. St. Louis S. W. Ry. Co. of Texas, 52 Texas Civil Appeals, 575, 581 (113 S. W. 613).

3.

There Was No Federal Grant of County Highways Prior to the Right of Way Grant of July 1, 1862, Nor Until Four Years Thereafter. The County of Alameda Did Not Adopt the Traveled Way as a County Road. Any Claim of the County to the Traveled Way Was Renounced by the State in the Legislative Acts of May 1, 1852, and April 4, 1864.

The opinion below recognizes the lack of congressional authority for the county highway through Niles Canyon. The court quotes from *Town of Red Bluff vs. Walbridge,* 15 Cal. App. 770, and says (R. pp. 191-192):

> "As against the federal government it (the county here) could not perhaps make a public highway over its lands without its consent or acquiescence, but the federal government is not complaining and its policy has always been to encourage the building of highways over the public domain, thereby facilitating its settlement and use, and this policy was crystallized into a statute passed on the 26th day of July, 1866."

The court below refers to the Niles Canyon highway as a way of necessity. (R. p. 190.) The doctrine of ways of necessity is foreign to the facts, there being no privity or other relation whatsoever between the railroad company and the county. Nor is it a fact that the topography of Niles Canyon offers any serious obstacle to modern highway construction. We may look to the opinion itself for the statement that in 1910 or thereabouts the county found it practical "to reconstruct much of its highway, and in doing so it moved a considerable stretch, lying about midway between Stony Brook and Sunol, within the railroad right of way and on the north side of the creek, to the south side of the creek and outside of the right of way". (R. p. 189.) This court may judicially know, what is matter of common knowledge, that highway engineers today are not balked by mountains or canyons, and are governed as much by scenery as by facility of construction.

The record is conclusive that the line adopted by the board of supervisors of Alameda County in 1859 i north of Alameda Creek throughout its entire distance through the canyon. It is equally conclusive that the way traveled was on both sides of the creek and in considerable part in the bed of the creek. Naturally those seeking passage through the canyon, where no

improved way existed, followed the route of easiest travel. Under the statute that did not constitute the way a public road. The California Statute of April 26, 1858, provides in section 1 that:

> "All roads in the counties of Tuolumne and Alameda shall be considered as public highways, which are now used as such, and have been declared such by order of the court of sessions or board of supervisors, or which may be declared such hereafter, by the board of supervisors within their respective counties; *provided*, that nothing in this act shall apply to any incorporated city or town within the counties named."

The route adopted by the board of supervisors was never opened, and the way used was never adopted.

> "Public highways are such only as come within the express provisions of the statute declaring them to be such, and that roads established without authority of law, for the convenience of individuals, are without any legal status either as public highways or as private ways."
>
> *Tucson Consolidated Copper Co, vs. Reese* (Ariz.), 100 Pac. 777, 778.

It may be conceded that the highway act of July 26, 1866, would take immediate effect upon approval as to highways previously laid out, *if the lands traversed were unappropriated public lands on the date of the act;* but that is not our case. Title to the lands here in question had passed out of the government and into Central Pacific Railroad Company of California instanter upon the approval of the right of way grant of July 1st, 1862. *Railroad Co. vs. Baldwin,* 103 U. S. 426.

The County of Alameda is only a political subdivision of the state; its claims cannot rise above the sovereign right. We have quoted the State's memorial of May 1, 1852, to Congress petitioning for this very transcontinental railroad as a matter of self-interest and granting to the federal government a right of way to that end. We have also cited the Act of April 4, 1864, whereby the state ratified and approved the grant made to petitioners' predecessor on July 1, 1862.

By the terms of the right of way grant the government retains a vital interest in maintaining its integrity. Section 12 of the grant provides in part that "the whole line of said railroad and branches and telegraph shall be operated and used for all purposes of communication, travel, and transportation, so far as the public and government are concerned, as one connected, continuous line". The federal government is directly interested in the question whether the county may as a matter of right appropriate to its own exclusive use essential portions of the right of way.

CONCLUSION.

It is therefore respectfully submitted that the merits of this case rest essentially upon federal questions calling for the exercise by this court of its supervisory powers, and that a writ of certiorari

should issue to the end that this court may review and reverse the decision of the court below.

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